

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

CLARENCE I. BRYANT, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
FRED BRITTEN, Warden of The )  
Tecumseh State Correctional )  
Institution, and JON BRUNING, the )  
Attorney General of the State of )  
Nebraska, )  
 )  
Respondents. )

4:09CV3167

**MEMORANDUM  
AND ORDER**

On January 29, 2010, the court dismissed Petitioner's habeas corpus claims with prejudice and entered judgment against him. (Filing Nos. [17](#) and [18](#).) On February 16, 2010, Petitioner filed a timely Notice of Appeal of the court's Judgment. (Filing No. [19](#).) Petitioner also filed a Motion for Leave to Appeal In Forma Pauperis ("IFP") (filing no. [20](#)) and a Motion to Appoint Counsel (filing no. [22](#)). However, Petitioner failed to file a Motion for Certificate of Appealability. (See Docket Sheet.)

***I. Motion for Leave to Appeal IFP***

Petitioner is a prisoner who has previously been granted leave to proceed IFP. (Filing No. [5](#).) [Federal Rule of Appellate Procedure 24\(a\)\(3\)](#) states:

(a) Leave to Proceed in Forma Pauperis . . . .

(3) Prior Approval. A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court—before or after the notice of appeal is

filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis and states in writing its reasons for the certification or finding[.]

*Id.* Because Petitioner was previously given leave to proceed IFP, he may now “proceed on appeal in forma pauperis without further authorization” in accordance with Fed. R. App. P. 24(a)(3).

### ***II. Motion to Appoint Counsel***

Petitioner’s Motion to Appoint Counsel on appeal should be addressed to the Eighth Circuit Court of Appeals. Therefore, the court denies Petitioner’s Motion to Appoint Counsel (filing no. 22) without prejudice to reassertion before the Eighth Circuit.

### ***III. Certificate of Appealability***

On February 18, 2010, the court granted Petitioner until March 16, 2010, to file a motion for Certificate of Appealability and brief in support in this matter. (Filing No. 23.) The court warned Petitioner that if he failed to file a motion for Certificate of Appealability and brief in support by March 16, 2010, the court would deny the issuance of a Certificate of Appealability without further notice. (Id. at CM/ECF p. 3.) Rather than comply with the court’s order, Petitioner filed a Motion for Stay and Abeyance. (Filing No. 24.) Accordingly, the court declines to issue a Certificate of Appealability.

IT IS THEREFORE ORDERED that:

1. Petitioner’s Motion for Leave to Appeal IFP (filing no. 20) is granted.

2. Petitioner's Motion to Appoint Counsel (filing no. [22](#)) is denied without prejudice to reassertion before the Eighth Circuit.

3. Petitioner's Motion for Stay and Abeyance (filing no. [24](#)) is denied as moot.

4. The court declines to issue a Certificate of Appealability.

5. The Clerk of the court shall provide the Court of Appeals a copy of this Memorandum and Order.

DATED this 30<sup>th</sup> day of March, 2010.

BY THE COURT:

s/ Joseph F. Bataillon  
Chief United States District Judge

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